Supreme Court, U.S.
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80-424

No. .....

In the Supreme Court of the United States

October Term, 1980

J. R. RUSSELL, *Petitioner,*

vs.

STATE OF KANSAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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DATED: September, 1980

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I. QUESTIONS PRESENTED

1. Whether the disciplinary rule of the Supreme Court of Kansas, DR 1-102, is unconstitutionally construed and applied when made the basis for public censure of petitioner for conduct unrelated to practice of law.

2. Whether petitioner is unconstitutionally denied his rights of freedom of speech and expression and equal protection under the law when, as a lawyer, he is publicly censured for publishing a political ad in a political campaign unrelated to law practice.

II. PARTIES

The parties to this proceeding are Petitioner and the State of Kansas. The State acts through the Disciplinary Board as an arm of the Supreme Court of Kansas.

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IV. OPINION BELOW

The opinion of the Supreme Court of the State of Kansas was filed on May 10, 1980. It is reported at 227 Kan. 897, 610 P.2d 1122 (1980). The order denying petitioner's motion for rehearing is not reported. It was filed June 20, 1980. The opinion and order denying rehearing are set forth in Appendix B.

The recommendation opinion of the Disciplinary Board Hearing Panel was filed on August 31, 1979 and set out at Appendix C.

V. JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3).

The validity of the Kansas Supreme Court Rules and Code of Professional Responsibility, K.S.A. 7-124 and K.S.A. 7-125, when construed and applied in such manner as to restrain petitioner's freedom of speech are drawn in question as being repugnant to the First Amendment to the United States Constitution, and the Fourteenth Amendment to the United States Constitution.

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

First Amendment to the United States Constitution:

"Congress shall make no law abridging the freedom of speech, or of the press; . . ."

Fourteenth Amendment to the United States Constitution:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

KANSAS STATUTES AND COURT RULES

K.S.A. 7-111:

"An attorney at law may be disbarred or disciplined by the Supreme Court, for any of the following causes arising after admission to practice in this state:

1. For willful disobedience of an order of court requiring the attorney to do or forbear an act *connected with or in the course of his or her profession. . . .*" (Emphasis supplied.)

K.S.A. 7-124: - Court Rules.

(Herein are set out the rules of the Supreme Court for administering the disciplinary procedures of the Court.)

K.S.A. 7-125: - Court Rules - Code of Professional Conduct (Pertinent portion)

DISCIPLINARY RULES

DR-1-102. Misconduct

A. A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

VII. STATEMENT OF CASE

Petitioner is a lawyer admitted to practice in the courts of Kansas and in the Supreme Court of the United States (admitted March 26, 1973). He was a candidate for public office for position as a member of the Board of Public Utilities of Kansas City, Kansas in the April, 1979 election. The Board of Public Utilities is a city subdivision of government provided for by law. Qualification for the office does not require a candidate to be an attorney, only to be a "qualified voter of the District".

There were fifteen candidates. Petitioner was the only attorney candidate. One of the other candidates, Paul Haas, was an incumbent. He filed a complaint against Russell before the Disciplinary Administrator. The other complainant was Nick A. Tomasic, the incumbent District Attorney of Wyandotte County, Kansas. Russell and Tomasic had been opponents in the primary election in 1976 for the office of District Attorney.

The subject matter of the complaint to the Disciplinary Administrator and the order of public censure issued by the Supreme Court of Kansas was a political ad published by Russell in THE KANSAN newspaper on January 21, 1979. The ad is set out in full in the appendix at D.

The complaints made by Tomasic and Haas were heard by a panel of three, two members of the Disciplinary Board and one other lawyer. The petitioner, by response to the complaint raised the issue of freedom of expression in a political campaign and that such freedom extended to a licensed lawyer. Again in opening statement at the beginning of the hearing, petitioner urged that he had the right of freedom of speech in his conduct during a political campaign and in remarks involving public officials. (Record on hearing, p. 19)

The report of the hearing panel was made on August 31, 1979 recommending public censure. (Copy of the report is in appendix at C.)

Petitioner filed an action in the United States District Court for the District of Kansas against the Kansas Supreme Court and the Kansas Board for Discipline of Attorneys seeking an injunction against the issuance of the public censure. The action was lodged under 42 U.S.C. 1983 seeking protection from irreparable harm from state action under color of a state statute (disciplinary procedure) which would result in deprivation of petitioner's Constitutional right of freedom of expression under the First Amendment to the United States Constitution. The Kansas Supreme Court refused to stay proceedings in that court. The Federal District Court of Kansas dismissed the action for lack of subject matter jurisdiction. Opinion of Judge O'Connor is set out in Appendix D.

Petitioner took exception to the panel's recommendation and raised the issue of an attorney's right of freedom of speech under the First Amendment of the United States Constitution.

The Supreme Court of Kansas, after briefs and argument, approved the hearing panel recommendation and issued public censure in a formal written opinion reported in *State v. Russell*, 227 Kan. 897. (Copy set out in Appendix A.)

The opinion of the Supreme Court of Kansas contains a separate opinion on a separate complaint by a complainant named Soptick. That portion of the case is not involved in this petition for Writ of Certiorari. Russell had been the subject of a prior complaint by Tomasic arising out of the 1976 campaign for District Attorney. The publication in that campaign was similar to the one here involved. It was

dismissed by the Disciplinary Board. A prior complaint by Soptick likewise was dismissed by the Disciplinary Board but was revived when the complaint here involved was set for hearing.

This petition is for review of the Tomasic-Haas complaint.

VIII. ARGUMENT

A. Case Of First Impression

This case is one of first impression. No other case has been found where governmental restraint has been imposed or a penalty imposed for speech made by a lawyer in political activity unrelated to law practice. The Kansas Supreme Court noted that "little authority can be found on the issue of professional discipline for political rhetoric directly implicating dishonesty under DR 1-102 (A)(4)." All the cases involving discipline out of political campaigns relate to judicial elections and administration of justice. The Kansas Court strains to find implication of dishonesty by finding that petitioner "with ordinary care should have known" his statements to be false. The Court then severely strains to find that such circumstances justify a valid governmental interest in censuring petitioner for such political conduct. In doing this the Court weighs in the balance the governmental regulatory power of the Court against the individual freedom of speech right of petitioner.

Such a reconciliation of the conflict by the Court is contrary to the manner in which the Federal Court in *Polk v. State Bar of Texas*, 374 F.Supp. 784, 787 resolved a similar case, the court saying: "Where the protections of the Constitution conflict with the efficiency of a system

to ensure professional conduct, it is the Constitution that must prevail and the system that must be modified to conform. . . ."

The major purpose of the First Amendment, to protect the free discussion of governmental affairs, *Buckley v. Valeo,* 424 U.S. 1, 46 L.Ed.2d 659, 96 S. Ct. 612, should not be subrogated to the rule making or administrative power of a professional housekeeping committee with the final approval of the Supreme Court of the State.

What the Kansas Supreme Court has done is to undo the admonition of Thomas Jefferson that "error of opinion may be tolerated when reason is free to combat it." (See quote in *Wilson v. Superior Court of Los Angeles County,* 532 P.2d 116.)

B. The Supreme Court Rule Is Vague And Will Create A Chilling Effect On Freedom Of Speech

The Kansas Supreme Court as the highest court of the state has inherent authority to regulate and discipline attorneys. The scope and nature of this governmental authority was noted by the United States Supreme Court in *Supreme Court of Virginia v. Consumers Union,* 100 S. Ct. 1967 (1980).

The Kansas Legislature by law enacted in 1913 and still in force in K.S.A. 7-111 provided, "an attorney at law may be disbarred or suspended by the Supreme Court for . . . willful disobedience of an order of court requiring him to do or forbear an act connected with or in the course of his or her profession . . ."

The rules of the Supreme Court relating to discipline and the procedure for administering the rules, are not statutory law. The reviser of statutes made note by pro-

logue to K.S.A. 7-124 that the rules were not statutory law but were printed as directed by K.S.A. 77-132(f).

The Supreme Court of Kansas acts in a legislative capacity in promulgating the rules, and in an adjudicative role in enforcing the rules.

In the opinion in this case, the Kansas Court has found petitioner subject to discipline for conduct in his personal and political activities. The court relied on Formal Opinion 336 of the Committee on Ethics and Professional Responsibility of the American Bar Association (June 3, 1974). (See page 902 of opinion set out in appendix. This A.B.A. formal opinion was post Watergate. (Appendix F))

Neither the Kansas Legislature nor the Kansas Supreme Court had adopted standards of conduct authorizing discipline for personal or political conduct. Such a rule exceeded the only Kansas legislative enactment authorizing discipline of attorneys for "an act connected with or in the course of [the legal profession] . . ." K.S.A. 7-111.

It is without question that the public interest requires proper rules and proper administration for discipline of the bar, but such authority should not be unlimited. The Kansas Supreme Court in exercising disciplinary power in the area of personal and political conduct without statutory or pre-determined or prior notice standards creates a chilling effect on political conduct by attorneys, and in doing so acts contrary to the public interest. Especially is this true when the restraint is against the exercise of the First Amendment rights of Freedom of Speech.

The very effect of such a decision as in this case of public censure of a lawyer for political speech in a political campaign unrelated to law practice is reason for the rule that a statute may be challenged on the ground

that it might be applied unconstitutionally in circumstances other than those before the court. *Dombrowski v. Pfister,* 380 U.S. 479, 14 L.Ed.2d 22, 85 S. Ct. 1116, *Broadrick v. Oklahoma,* 413 U.S. 601, 610, 37 L.Ed.2d 830, 93 S. Ct. 2908 (1973). See also *Bates v. State Bar of Arizona,* 433 U.S. 350. 53 L.Ed.2d 810, 97 S. Ct. 2691. A lawyer, particularly young lawyers, who might contemplate political activity might be discouraged by the in terrorem effect of the Kansas Code of Ethics as construed in this case.

The Supreme Court rule relied on for a code of conduct is vague and lacks requisite specificity whereby petitioner and others might enjoy freedom of speech without jeopardizing their license to practice law.

C. Petitioner Is Deprived Of Equal Protection Under The Law

It was admitted that there were no grounds for libel and that had petitioner been a layman rather than lawyer complainants would have had no remedy. The State did not allege malice on part of petitioner nor did they attempt to prove malice.

Petitioner is punished for exercise of free speech because he is a lawyer for conduct a non-lawyer might carry on with impunity. A lawyer should not be relegated to second-class citizenship. (*Spevak v. Klein,* 385 U.S. 511) A lawyer should at the least be entitled to the same latitude of free speech in a political campaign as any other individual without threat of loss of his license to practice law. Justice Prager in the dissenting opinion pointed out the detrimental effect the decision can work on the political process. (Appendix A)

D. Kansas Bill Of Rights Cannot Limit Rights Under First Amendment

The Kansas Supreme Court relied on the Bill of Rights of the Kansas Constitution as a qualification of the right to Freedom of Speech (see page 899 of decision - Appendix A). Section 11, Kansas Bill of Rights provides:

> "The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, *being responsible for the abuse of such rights*; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted." (Emphasis supplied by Supreme Court of Kansas.)

The Kansas Constitution cannot limit rights of free speech protected by the First Amendment of the United States Constitution.

IX. NO SIGNIFICANT STATE INTEREST

Finally and principally, no significant state interest is threatened. The Supreme Court of Kansas recited the pertinent principles and cited the controlling cases. The interest threatened must be real. The connection relied on by the Kansas Supreme Court is that because the disciplinary panel found conduct on part of petitioner in making a political speech which they deemed involving dishonesty "raises questions as to his ability to represent clients honestly". (P. 904 of opinion) Such a connection is speculative, not real, and does not threaten a state interest.

The real threat to a state interest is that if Formal Opinion 336 of the American Bar Association is to be

incorporated into the Ethics Code of the Kansas Court Rules, then the private and political lives of all lawyers are subject to scrutiny and review by a bar committee and the Supreme Court for all conduct, personal as well as professional. The mischief done by such a system will be greater than public service ends that are sought.

X. CONCLUSION

WHEREFORE, petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of tne Supreme Court of Kansas in *State v. Russell*, 227 Kan. 897. In the event that the petition is granted, petitioner prays that the judgment of the court below be reversed, that the cause be remanded, and that the court below be directed to recall and purge the public censure for violation of DR 1-102(A)(4) of the Court Rules.

Respectfully submitted,

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DATED: September, 1980

APPENDIX

APPENDIX A

No. 51,423

STATE OF KANSAS,
Petitioner,

v.

J. R. RUSSELL,
Respondent.

No. 51,424

STATE OF KANSAS,
Petitioner,

v.

J. R. RUSSELL,
Respondent.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Freedom of Speech—Application to Attorneys.* A person's constitutional right to freedom of speech guaranteed by the Constitutions of the United States and of the State of Kansas is no less by reason of having received a license and privilege to practice law.

2. SAME—*Freedom of Speech—Application to Attorneys—When Exercise of Right Restricted.* It is only in those instances where unbridled speech amounts to misconduct which threatens a significant state interest that a state may restrict a lawyer's exercise of rights guaranteed by the Constitutions.

3. ATTORNEY AND CLIENT—*Attorney's Statements in Political Campaign—Disciplinary Action.* Although a lawyer may speak out and state his opinions on current campaign issues without fear of jeopardizing his license to practice law, his First Amendment rights are not absolute. The guarantee of freedom of speech will not protect him from disciplinary action as a lawyer if he is guilty of known falsehood intentionally used and published for the purpose of misleading the voters and gaining personal advantage for himself or his candidate.

4. SAME—*Code of Professional Responsibility—Application Whether or Not Attorney Acting as Lawyer.* A lawyer is bound by the Code of Professional Responsibility adopted by rule of this court in every capacity in which the lawyer acts, whether acting as a lawyer or not.

5. SAME—*Disciplinary Proceeding—Dismissal of Complaint With or Without Prejudice.* A review committee of the Kansas Board for Discipline of Attorneys has the authority to dismiss a complaint against an attorney with or without prejudice under Rule 210, Rules of the Supreme Court; and when dismissal is ordered without specifying the nature of the dismissal, the dismissal is without prejudice to the filing of later proceedings in the same matter.

6. SAME—*Disciplinary Proceeding—Res Judicata or Double Jeopardy Theories to Bar Complaint Filed for Second Time.* A complaint, which was previously dismissed without prejudice after an investigation under Rule 210, Rules of the Supreme Court, is not barred under theories of res judicata or double jeopardy from a hearing if it appears additional facts may be developed which were not available at the initial investigation.

Original proceeding in discipline. Opinion filed May 10, 1980. Judgment for Petitioner.

Roger N. Walter, disciplinary counsel, argued the cause and was on the briefs for the petitioner.

John Anderson, Jr., of Anderson, Granger, Nagels & Lastelic, Chartered, of Overland Park, argued the cause and was on the briefs for the respondent.

The opinion of the court was delivered by

FROMME, J.: Two separate complaints were filed against J. R. Russell, a licensed attorney, one on April 10 and the other on April 18, 1979. The complaints were heard separately by the same panel of the Kansas Board for Discipline of Attorneys. The panel filed a report in both cases with findings and recommendations on August 31 and September 5, 1979, respectively. The respondent filed answers to the panel reports promptly, but delay in setting the cases for argument occurred when the respondent made an attempt to have the United States District Court for the District of Kansas permanently enjoin this court and the Kansas Board for Discipline of Attorneys from hearing the disciplinary proceedings. The respondent's request for injunction was denied by the federal court. Briefs were then filed by both respondent and disciplinary counsel, and we have proceeded to hear and decide the matters.

The first complaint which will be discussed and evaluated concerns a political advertisement placed in *The Kansan*, a newspaper of Kansas City, Kansas, in an unsuccessful attempt by J. R. Russell, respondent, to unseat Paul Haas as a member of the Board of Public Utilities. This will be referred to as the Haas complaint.

The second complaint, which will be discussed and evaluated later, concerns the handling of a tort claim by

J. R. Russell which claim arose from an automobile collision occurring when a minor daughter of Paul R. Soptick was driving her father's car. This will be referred to as the Soptick complaint.

I

We will consider the Haas complaint first.

J. R. Russell, a lawyer ran for public office seeking a position on the Board of Public Utilities (B.P.U.) of Kansas City, Kansas, in the April, 1979, election. The only qualification for the office is being a "qualified voter of the district." During the campaign J. R. Russell placed a political advertisement in *The Kansan* on January 21, 1979, which advertisement we will examine in some detail later. It will suffice to say the article was uncomplimentary of both Paul Haas and Nick Tomasic, the district attorney of Wyandotte County.

A similar article had been published by J. R. Russell in a 1976 campaign for the office of district attorney when Russell ran against Nick Tomasic for that position. At that time a complaint was also lodged with the Kansas Board for Discipline of Attorneys (Board) by Nick Tomasic. The complaint was later dismissed for lack of sufficient evidence to prove misconduct. The incident is cited by respondent to indicate bad faith in filing the present complaint because of the similarities in the article published and the previous dismissal. Respondent suggests the present complaint should have been dismissed by the Board.

The panel, after hearing the evidence, found that the respondent prepared the article for publication, placed the same in the newspaper, and knew some of the statements in the article were false, deceptive and misleading. The

panel concluded that J. R. Russell had violated the following disciplinary rule:

"DR 1-102 Misconduct.

(A) A lawyer shall not:

. . . .

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

. . . .

"(6) Engage in any other conduct that adversely reflects on his fitness to practice law." Code of Professional Responsibility, Rule No. 225, 225 Kan. xciii.

The panel recommended that J. R. Russell be disciplined and be publicly censured by this court. The respondent Russell took exception and filed an answer raising certain issues in this court concerning an attorney's right to freedom of speech under the First Amendment of the United States Constitution and Section 11, Bill of Rights, Constitution of the State of Kansas.

Section 11 of the Kansas Bill of Rights states:

"The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, *being responsible for the abuse of such rights*; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted." Emphasis supplied.

The First Amendment to the United States Constitution merely states that Congress shall make no law abridging the freedom of speech, or of the press, but Section 11 of the Kansas Bill of Rights further explains that all

persons may freely speak, write or publish their sentiments on all subjects, "being responsible for the abuse of such rights." This last phrase recognizes that freedom of speech and press is not without certain limitations. The two constitutional provisions are generally considered coextensive. *State v. Motion Picture Entitled "The Bet"*, 219 Kan. 64, 72, 547 P.2d 760 (1976).

Freedom of speech and of the press, which are secured against abridgment by these Constitutions, are among the most fundamental personal rights and liberties of the people. *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964). These constitutional provisions do not confer an absolute right to speak or publish without responsibility for whatever one may choose to communicate. *Branzburg v. Hayes,* 408 U.S. 665, 683, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972). These provisions in our Constitutions have never prohibited punishment of those who abuse the freedoms guaranteed thereunder. *Stromberg v. California,* 283 U.S. 359, 369, 75 L.Ed. 1117, 51 S.Ct. 532 (1931). A person's constitutional right to freedom of speech guaranteed by the Constitutions of the United States and of the State of Kansas is no less by reason of having received a license and privilege to practice law. *In re Gorsuch,* 76 S.D. 191, 75 N.W.2d 644 (1956), 57 A.L.R.2d 1355 (1958). The principle that the right of freedom of speech is not absolute was expressed most clearly by Justice Oliver Wendell Holmes when he said that no person has a right to cry "fire" in a crowded theatre.

In delineating the boundary between acceptable regulation and impermissible restraint on freedom of expression, the manner and time of regulation will affect the severity of the court's scrutiny. Restraint of speech and written publication prior to exercise of these rights presents a separate issue from regulation and discipline after

the fact. *Organization For A Better Austin v. Keefe,* 402 U.S. 415, 29 L.Ed.2d 1, 91 S.Ct. 1575 (1971); *State v. Motion Picture Entitled "The Bet",* 219 Kan. 64. The cases which concern questions dealing with prior restraint of speech and press are not applicable to our present case. The imposition of the ethical obligation of honesty upon lawyers under DR 1-102(A)(4) and subsequent discipline for violation of the rule is permissible and may be necessary in the interests of the administration of justice. It is only in those instances where unbridled speech amounts to misconduct which threatens a significant state interest, that a state may restrict a lawyer's exercise of personal rights guaranteed by the Constitutions. *Spevack v. Klein,* 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625 (1967); *N.A.A.C.P. v. Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 1 L.Ed.2d 796, 77 S.Ct. 752, 64 A.L.R.2d 288 (1957); *Konigsberg v. State Bar,* 353 U.S. 252, 1 L.Ed. 2d 810, 77 S.Ct. 772 (1957); *In re Sawyer,* 360 U.S. 622, 3 L.Ed.2d 1473, 79 S.Ct. 1376 (1959).

When conflict occurs between the regulatory powers of government, as for example, the subsequent imposition of discipline for misconduct by a state-licensed attorney, and the individual liberty to speak and publish, a reconciliation must be effected requiring a careful weighing and balancing of the respective interests. Such measures of regulation are not prohibited where justified by a valid governmental interest within the administration of justice, and when the measures are not intended to control the content of speech but only incidentally limit its unfettered exercise.

As to the nature of governmental interest within the administration of justice which justifies such control, it was stated in *Polk v. State Bar of Texas,* 374 F. Supp. 784 (N.D. Tex. 1974):

> "Generally there are two areas where a state has a significant interest in prescribing standards of attorney conduct. An attorney may be disciplined for conduct which shows his inability to represent clients competently and honestly. An attorney may also be disciplined for conduct which interferes with the processes of the administration of justice . . . ." pp. 787-788.

Respondent notes that little authority can be found on the issue of professional discipline for political rhetoric directly implicating dishonesty under DR 1-102(A)(4). However, extensive treatment is afforded the issues of discipline of attorneys for publications made in the course of political campaigns for the election of judges. See annotations in 57 A.L.R.2d 1362 and 12 A.L.R.3d 1408. An attorney may be disciplined for criticism in the heat of a political contest if such criticism is carried beyond the limits of truth and fairness. *In re Charles A. Thatcher,* 80 Ohio St. 492, 89 N.E. 39 (1909). Within that context the expression of opinion is protected if true or in good faith believed to be true, but when derogatory factual allegations are false and with ordinary care should have been known to be false, discpline may be imposed. *State Board of Exam. v. Spriggs,* 61 Wyo. 70, 155 P.2d 285 (1945).

In *State v. Nelson,* 210 Kan. 637, 640, 504 P.2d 211 (1972), this court stated:

> "Concerning respondent's argument that DR 1-102 (A) (5) creates an impermissible and chilling effect on 'First Amendment freedoms,' an examination of decisions on the point (12 A.L.R.3d, Anno., p. 1408) reveals the consensus to be that an attorney's right to free speech is tempered by his obligation to both the courts and the bar . . . ."

In the case of *In re Baker*, 218 Kan. 209, 542 P.2d 701 (1975), a disciplinary proceeding arising out of a political campaign against an incumbent judge, this court held that a challenger in a partisan election for judicial office is free to criticize an incumbent's record so long as the criticism is accurate. However, a violation of ethics was found and the challenger was censured for publishing untrue statements concerning eligibility for a disability pension, which statements the challenger knew or could have known were false by reading an applicable state statute.

Although a lawyer may speak out and state his opinions on current campaign issues without fear of jeopardizing his license to practice law, his First Amendment rights are not absolute. The guarantee of freedom of speech will not protect him from disciplinary action as a lawyer if he is guilty of known falsehood intentionally used and published for the purpose of misleading the voters and gaining personal advantage for himself or his candidate.

It is suggested that because the respondent was not acting in the capacity of an attorney and was not seeking an office requiring the person to have a license to practice law, the Code of Professional Responsibility applicable to lawyers should not apply. We do not agree.

It is recognized generally that lawyers are subject to discipline for improper conduct in connection with business activities, individual or personal activities, and activities as a judicial governmental or public official. *In re Kirtz*, 494 S.W.2d 324 (Mo. 1973); *In re Wilson*, 391 S.W. 2d 914 (Mo. 1965); *Chernoff's Case*, 344 Pa. 527, 26 A.2d 335 (1942). A lawyer is bound by the Code of Professional Responsibility adopted by rule of this court in every capacity in which the lawyer acts, whether acting as a

lawyer or not. Formal Opinion 336, Committee on Ethics and Professional Responsibility of the American Bar Association, June 3, 1974.

Now let us turn to the facts contained in the article published by respondent in *The Kansan*. The political advertisement appears to be three columns wide and a full page in length. The respondent listed five factual statements in the article charging misconduct, illegal acts and violation of law by the incumbent member of the B.P.U., and by the district attorney of Wyandotte County. Several of these statements contained partial truths which were used to cast aspersions by innuendo on the incumbent member of the B.P.U. and the district attorney.

Although many of the statements do not appear in good taste, they are largely political rhetoric and cannot be the basis for discipline when viewed under the light of the First Amendment. However, there were false statements made which respondent knew or should have known to be false which involved dishonesty and misrepresentation violating DR 1-102 (A) (4). Russell made the statement: "Some 'unknown' water & light employees helped their friends embezzle over $600,000.00 from the city water & light dept. over a 3 year period. All parties involved went free and unprosecuted."

The panel found: "(c) There is no evidence to support Russell's statement following Fact No. 2 that '$600,000.00 was embezzeled from the City Water and Light Department.'" There was an audit of the books of the department for that period. The audit report was on file and available to respondent. It reports bookkeeping errors during the period of $335,000.00 and an additional unexplained discrepancy in the books of $200,000.00. The audit disclosed no acts of embezzlement.

The article further stated:

"FACT NO. 5: PAUL HAAS, UTILITY BOARD PRESIDENT, SIGNED AN ILLEGAL $35,000 CONTRACT IN 1975 WITH THE PROTECTION SPRINKLER COMPANY. The execution of the contract was in violation of K.S.A. 75-4317. THERE ARE NO MINUTES OF THIS CONTRACT IN THE UTILITY BOARD'S WEEKLY MEETING MINUTES BOOK. AGAIN, IN VIOLATION OF K.S.A. 75-4317 (Kansas Sunshine Laws).

"RUSSELL'S STATEMENT: THE DIST. ATTY. HAS KNOWLEDGE OF THESE ILLEGAL ACTS SINCE 1975. FOR THE PAST 3 YEARS HE HAS REFUSED TO ACT. INSTEAD HE ACTS AS IF HE WERE THE 'GUARDIAN ANGEL' FOR THE UTILITY BOARD INSTEAD OF ATTORNEY FOR THE PEOPLE OF WYANDOTTE COUNTY."

The panel found:

"(f) In Fact No. 5 of Respondent's Exhibit 1 and in Russell's statement following it, Russell states information that is not substantiated by evidence and is totally untrue. He cites Kansas statutes which are irrelevant and not applicable to the facts stated and then alleges that the law was violated when it was not."

The basis for the panel's findings was testimony that investigation of allegations of such an illegal contract had been made. The Kansas Bureau of Investigation, the offices of the attorney general and of the district attorney had investigated the matter. The possible purchase of a sprinkler system had been informally considered in connection with insurance coverage. The purchase was ulti-

mately abandoned as being unnecessary. The insurance was obtained without installing the sprinkler system. The investigation revealed that no contract of purchase was in existence. The seller of the system had merely submitted a proposal to the board. The proposal was never approved or accepted. The investigations resulted in the conclusion that there was no evidence that any crime was committed. This was generally brought to light in the community and the respondent knew or should have known his charges in connection therewith were false.

After having examined the statements made by the respondent in an effort to delineate the boundary between acceptable regulation and impermissible restraint on freedom of expression, we hold that first amendment rights in this case cannot protect the respondent from disciplinary action. He was guilty of intentionally publishing known falsehoods which were used for the purpose of attempting to gain personal advantage by misleading the public. In so doing he engaged in conduct involving dishonesty and misrepresentation which raises questions as to his ability to represent clients honestly. This is an area where the State does have a significant interest in prescribing and enforcing standards of attorney conduct.

J. R. Russell is hereby publicly censured for violation of DR 1-102(A)(4), 225 Kan. xciii.

II

We now turn to the Soptick complaint. The complaint concerns the representation by J. R. Russell of complainant, Paul R. Soptick, on a personal injury and property damage claim arising from a car accident. A minor daughter of the complainant was driving the family car when she was struck from behind by a vehicle owned and driven by Edward Willis. Willis was not insured. J. R. Russell

was retained by Soptick on April 19, 1978. Soptick signed a contract for employment with Russell which provided for a 50% contingent fee, and in addition Soptick paid Russell $300.00 for a retainer plus $43.00 court costs. A petition was filed in court April 26, 1978, but summons was returned without service. Willis could not be located. Frequent and numerous attempts by Soptick thereafter to contact Russell were unsuccessful. Russell's secretary was instructed by Soptick to have Russell call when he was available. He failed to do so. As late as August 14, no service of summons had been obtained on Willis. Soptick met Russell on the street and arranged for a meeting in Russell's office for September 13, but Russell did not make it to the meeting. Soptick then left a request to call him but again received no response. The case had languished in the court without summons being served for five months. Soptick sent a complaint to the disciplinary administrator. Russell notified Soptick on September 22 he was withdrawing from employment. Soptick's complaint against Russell then was dismissed on December 6, 1978. Soptick understood the $300.00 retainer was to be refunded and notified Russell to that effect. Soptick attempted twice to contact Russell but was unsuccessful. Soptick then renewed his complaint against Russell with the disciplinary administrator. A formal complaint was again issued against Russell and two days later Russell refunded the retainer fee and filed a motion in the court to withdraw as attorney for the Sopticks.

The panel found that respondent, after filing the petition, took no further action to pursue Soptick's claim. Russell kept no time records, recorded no contacts with the Sopticks, and introduced no evidence as to the amount of fee, if any, earned by him. The panel concluded there were several violations of the disciplinary rules governing the attorney-client relationship. The first was DR 2-110

relating to withdrawal from employment which requires the attorney to obtain permission for withdrawal from the court in which a case is pending before terminating the client-attorney relationship. The attorney is required to deliver all papers to the client and refund any part of an advance fee which has not been earned. The panel found the respondent failed to comply with this rule until he was under the compulsion of the second discplinary proceeding.

The panel further found a violation of DR 6-101(A) (2) and (3), in failing to act competently, in attempting to handle a legal matter without adequate preparation and in neglecting a legal matter entrusted to him. The panel found a violation of DR 7-101 in failing to carry out the contract of employment entered into with the client. The panel further found that the respondent violated DR 7-102(A)(2) in knowingly making a false statement of fact in the petition filed on behalf of the daughter of Paul R. Soptick by stating she had incurred over $500.00 in medical services and had met the threshold requirements of the so-called "no-fault" insurance law, K.S.A. 1979 Supp. 40-3117.

We turn now to the arguments of respondent. He first contends that when the complaint was referred to the disciplinary administrator, investigated by the Kansas Board for Discipline of Attorneys and dismissed for insufficient evidence, this resulted and had the same effect as a dismissal of a court case on the merits. He argues dismissal was with prejudice against filing the second complaint on the same matter. Respondent equates our procedure in disciplinary hearings with the rules of civil procedure, specifically K.S.A. 60-241(*a*). This statute is not helpful to respondent for the statute provides: "Unless otherwise stated in the notice of dismissal or stipulation,

the dismissal is without prejudice." It should be noted, however, the only application of the Code of Civil Procedure in disciplinary hearings appears under Rule 211, Rules of the Supreme Court, 225 Kan. lxxxvi, where the rules of evidence are made applicable to hearings before the panel, nothing more.

Both parties cite the case of *State Bar v. Woll*, 401 Mich. 155, 257 N.W.2d 650 (1977), which holds the Michigan State Bar Grievance Board and its hearing panel has the authority to dismiss a complaint against an attorney with or without prejudice. Authority for this appears in the Rules of the Michigan State Bar, rules 16, 16.11 and GCR 1963, 504.1(2). The Michigan holding is logical and practical.

In the present case the letter of dismissal merely notified respondent that the state board had directed the disciplinary administrator to dismiss the complaint. Nothing was said about prejudice. The initial investgation provided for in Rule 210, Rules of the Supreme Court, for discipline of attorneys, is for the purpose of determining "probable cause to believe there has been a violation of the Code of Professional Responsibility" which may require formal discipline. The nature of the investigative portion of the proceedings, before formal hearings begin, are more in the nature of a preliminary hearing, the dismissal of which should not have the force of res judicata. *Bernard v. State*, 261 So. 2d 133 (Fla. 1972); Annot., 49 A.L.R.3d 1039. Jeopardy attaches in a nonjury trial when the trial begins, not before. *Cox v. State*, 205 Kan. 867, 473 P.2d 106 (1970).

Accordingly we hold a review committee of the Kansas Board for Discipline of Attorneys has the authority to dismiss a complaint against an attorney with or without prejudice under Rule 210, Rules of the Supreme Court; and when dismissal is ordered without specifying the nature

of the dismissal the dismissal i without prejudice to the filing of later proceedings on the same matter.

Although disciplinary proceedings against attorneys are neither civil or criminal (*State v. Holmes,* 218 Kan. 531, 545 P.2d 343 [1976]) such proceedings have frequently been characterized as quasi-criminal in nature for purposes of considering the application of procedural safeguards. *In re Ruffalo,* 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222, *reh. denied* 391 U.S. 961, 20 L.Ed.2d 874, 88 S.Ct. 1833 (1968). The sanctions threatened under such proceedings, loss of professional status and livelihood, have been equated to criminal penalties for the purposes of deciding whether the clause against self-incrimination of the Fifth Amendment applied in such proceedings. *Spevack v. Klein,* 385 U.S. 511.

A complaint which was previously dismissed without prejudice after an investigation under Rule 210, Rules of the Supreme Court, is not barred under theories of res judicata or double jeopardy from a hearing if it appears additional facts may be developed which were not available or known during the initial investigation. Here a promise was made to withdraw from the case and to refund the retainer fee. That promise was not kept until after the second formal complaint was served. Neither res judicata nor double jeopardy precluded action under the second complaint.

The final issue raised by respondent concerns alleged violations of certain rules of conduct under the Code of Professional Responsibility which respondent claims were not properly disclosed to him by the formal complaint. After examining each of these matters raised by respondent we believe they were sufficiently encompassed within the Soptick complaint as to meet due process requirements in the filing of a disciplinary complaint. The formal com-

plaint did provide the respondent adequate notice of the alleged misconduct for him to properly defend the action. See *In re Ruffalo*, 390 U.S. 544; *State v. Berkley*, 214 Kan. 571, 520 P.2d 1255 (1974); *State v. Turner*, 217 Kan. 574, 538 P.2d 966 (1975).

However, the hearing panel found a violation of DR 7-102(A)(1) and (2) in that he "[k]nowingly made a false statement" in the petition he filed with the court involving the Soptick tort action. The panel found the petition in the action erroneously stated the threshold requirement for medical expenses of $500.00 was met under the Kansas Automobile Injury Reparations Act as required in K.S.A. 1979 Supp. 40-3117 (*b*). The threshold must be met to permit a person to recover for pain, suffering, mental anguish and inconvenience. The petition in the case was never heard by the court. It has been held that this monetary threshold requirement of the statute may be met not later than the date of trial or the date the cause of action is barred by the statute of limitations, whichever first occurs. *Key v. Clegg*, 4 Kan. App. 267, Syl. ¶ 5, 604 P.2d 1212, *rev. denied* March 7, 1980. Time for proving the monetary threshold requirement had not yet arrived and although the statement in the petition may have been technically incorrect at the time the petition was drawn, it can hardly be said respondent intentionally meant to mislead the parties or the court thereby. No discipline can be based thereon.

After examining the various contentions of the respondent we find he did neglect a matter entrusted to him and did not act promptly in keeping his promise to withdraw from the case and refund the retainer fee. J. R. Russell is hereby publicly censured for violation of DR 2-110 (A)(1) and (3), DR 6-101(A)(2), and DR 7-101(A)(1).

PRAGER, *J.*, concurring and dissenting.

While concurring with the majority decision with respect to the Soptick complaint, I respectfully dissent as to the majority decision on the Haas complaint. The majority has correctly noted the general rule recognized in *State v. Nelson,* 210 Kan. 637, 640, 504 P.2d 211 (1972), that an attorney's constitutional right of free speech is tempered by his obligation to the courts and the bar, a limitation not imposed upon the ordinary citizen. Because of the seriousness of any state infringement upon a constitutionally protected freedom, the court has properly limited its ability to discipline attorneys for violations of the Code of Professional Responsibility only in those instances where the exercise of the constitutional right infringes upon some significant state interest. In defining the scope of a significant state interest, this court has approved the rationale of *Polk v. State Bar of Texas,* 374 F. Supp. 784, 787-788 (N.D. Tex. 1974), which holds that the state has a significant interest only when the attorney's conduct reflects on his ability to represent his clients competently and honestly, or interferes with the administration of justice. The majoriy in this case has concluded that respondent's campaign advertisement contained statements which he should have known were false, thereby adversely reflecting on his ability to represent his clients competently and honestly. It is with this conclusion that I disagree.

In *Polk v. State Bar of Texas,* 374 F. Supp. 784, the attorney Polk had made derogatory statements about the professional conduct of the prosecuting attorney and judge in a criminal case in which Polk was the defendant. The court found the statements insufficient grounds for discipline, as Polk's statements were made in the capacity of a private citizen and outside his professional status as an attorney. The court concluded that while, in some in-

stances, discipline might be appropriate, in that case there was no evidence that Polk's conduct in any way affected either his representation of his clients or the administration of justice. In the case at bar, there is, likewise, a lack of showing that the statements made by respondent Russell adversely affected his ability to represent his clients or the administration of justice. This case is, therefore, readily distinguishable from those cases in which discipline was held appropriate for abusive and unfounded attacks on the integrity of an incumbent judicial candidate, as undermining the effectiveness of the judge and the administration of justice. See the cases cited in 57 A.L.R.2d 1362, Attorney's Conduct in Political Campaign as Ground for Disbarment or Other Disciplinary Action. See also *In Re Sawyer,* 360 U.S. 622, 3 L.Ed.2d 1473, 79 S.Ct. 1376 (1959) (conduct did not impugn integrity of the trial judge, and, therefore, did not obstruct the orderly administration of justice).

I, likewise, cannot agree with the majority's conclusion that, because Section 11 of the Kansas Bill of Rights specifically states that a person exercising his right to free speech is responsible for abuse of that right, it should follow that respondent in this action is to be subjected to professional discipline for his campaign advertisment. In Kansas, a political candidate puts his qualifications into issue, and any comment thereon, however injurious, is privileged so long as the comment is made in good faith. See *Good v. Higgins,* 99 Kan. 315, 161 Pac. 673 (1916); *Coleman v. MacLennan,* 78 Kan. 711, 98 Pac. 281 (1908); and *State v. Balch,* 31 Kan. 465, 2 Pac. 609 (1884). This rule is in accord with the more recent decisions that a communication which is qualifiedly privileged is not libelous unless actual malice is pleaded and proved. *Bradford v. Mahan,* 219 Kan. 450, 456, 548 P.2d 1223 (1976). A candidate for political office has a cause of action in defamation under

Kansas law for false criticism by his opponent only when such criticism is motivated by malice. In the present case, counsel for the disciplinary administrator in his brief has conceded that the publication here in issue was in all likelihood privileged under the law of libel and slander.

Where, as here, the attorney was acting outside of his professional capacity in the exercise of his constitutional right to free speech and the offending conduct could not reasonably affect his representation of clients or interfere with the administration of justice, there is no sound basis for professional discipline. The threat of discipline in such a case will have the effect of chilling an attorney's exercise of his right to free speech by discouraging him from entering into and participating fully in the political process. I, therefore, respectfully dissent.

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 51,423

State of Kansas, Petitioner,

v.

J. R. Russell, Respondent.

You are hereby notified of the following action taken in the above entitled case:

Motion by Respondent for Rehearing.

Considered and DENIED.

Yours very truly,

Lewis C. Carter
Clerk Supreme Court

Date June 20, 1980

APPENDIX C

BEFORE THE KANSAS BOARD FOR DISCIPLINE OF ATTORNEYS

Nick A. Tomasic,
Complainant,

No. W1471,

J. R. Russell,
Respondent.

Paul A. Haas,
Complainant,

No. W1464,

J. R. Russell,
Respondent.

REPORT OF HEARING PANEL

(Received August 31, 1979, Disciplinary Administrator)

The hearing on the above complaints was held on Thursday, June 21, 1979 and Friday, June 22, 1979, in Hearing Room #2, Third Floor, Kansas Judicial Center, 301 West 10th, Topeka, Kansas. The hearing panel was composed of Paul L. Wilbert, Chairman; Lee Hornbaker, member of the Board of Discipline; and Ms. Christel E. Marquardt, an attorney from Topeka, Kansas. Respondent appeared in person and by his attorney, John Anderson, Jr. Philip A. Harley, Disciplinary Counsel, appeared for and on behalf of the complainants and on behalf of the office of the Disciplinary Administrator.

THE FACTS

We find the following facts:

1. There was an election in Kansas City, Kansas in January, 1979, concerning the Board of Public Utilities. J. R. Russell, an attorney of Kansas City, Kansas, was a candidate for the Board. J. R. Russell was not only a candidate but a practicing attorney and this was the principal fact which brought about the above complaints.

2. Nick Tomasic, District Attorney for Wyandotte County filed a complaint against Russell for ads Russell ran in the election of 1976 at which time they were opponents (Respondent's Exhibit 14). This complaint was dismissed by the former State Board of Law Examiners (Respondent's Exhibit 14 - Letter of December 14, 1976). Russell used the same statements in basically the same form in his 1978 ads as those used in his 1976 campaign. Russell never made any attempt to check the accuracy of his statements in 1978 despite the questions raised in 1976.

3. The Board of Public Utilities ran an advertisement on December 31, 1978 (Respondent's Exhibit 1) which caused Russell to write a letter to Nick Tomasic, District Attorney for Wyandotte County and Donald E. Martin, City Attorney for Kansas City, Kansas, with copies of the letter being sent to *The Kansan, Kansas City Star* and *Wyandotte West.* (State's Exhibit 8) As a result of this letter, a Kansas City Star reporter called Tomasic and in answer to one of her questions Tomasic said:

> "I am personally acquainted with Mr. Russell and the statements he makes. I've never known him to make a statement that was supported by *Evidence* or *Facts.*"

4. Russell then placed an advertisement in *The Kansan* (Respondent's Exhibit 1). As a result of this ad

Tomasic and Haas filed complaints (Respondent's Exhibit 17) stating that the statements in the ad were false, deceptive and misleading.

5. The ad is false and misleading in the following respects:

(a) The alleged quote by Russell in Fact No. 1 (State's Exhibit 1 and Respondent's Exhibit 1) does NOT appear in any pleadings of the case to which Russell refers which was filed by the District Attorney on November 17, 1975.

(b) In Fact No. 2 of Exhibit 1, Russell alleged that "$12,500.00 was paid on a surety bond from U.S.F. & G. Insurance Co." The truth is that $12,500.00 was NOT paid by U.S.F. & G. Insurance Co.

(c) There is no evidence to support Russell's statement following Fact No. 2 that "$600,000.00 was embezzeled from the City Water and Light Department."

(d) Fact No. 4 in Respondent's Exhibit 1 states that Haas received $155.00 per month insurance benefits when in fact Haas did not receive those benefits.

(e) Russell's statement with Proof and Evidence following Fact 4 states false information. Russell knew, as attorney for the plaintiffs in the cause of action cited that the issues raised by his statements were decided exactly opposite to what he alleges (Respondent's Exhibit 10).

(f) In Fact No. 5 of Respondent's Exhibit 1 and in Russell's statement following it, Russell states information that is not substantiated by evidence and is totally untrue. He cites Kansas statutes which are irrelevant and not applicable to the facts stated and then alleges that the law was violated when it was not.

Here we again have an election, ads, Tomasic and Russell — but with a difference. Tomasic was not a candidate and had no connection with Board of the Public Utilities. Russell was a candidate for the Board of Public Utilities. Haas was a member of the Board of Public Utilities.

CONCLUSION

It is apparent that one must be careful to separate the political situation, the personal animosity and the Tomasic-Russell feud.

We conclude that Russell has violated the following Code of Ethics:

"DR-102 Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Rule 202 - Grounds for Discipline - states:

"It is the duty of every recipient of that privilege (to practice law in this state) to conduct himself at all times, both professionally and personally in conformity with the standards imposed upon members of the bar as conditions for the privilege of practicing law. Acts or omissions by an attorney, . . . which violate the Attorney's Oath of Office as set forth in Rule 702(h), or the Code of Professional Responsibility as set forth in Rule 225 hereof, . . . shall constitute misconduct and shall be grounds for discipline, *whether or not the acts or omissions occurred in the course of an attorney-client relationship.*"

It was said by Judge Stephens in the early days of lawyers in Kansas:

> "The first requisite of a good lawyer, and I speak unhesitatingly, is moral honesty, strict integrity. He needs . . . but also a sense of justice — that instinct which makes up the gentleman, and which scorns the dishonorable act that may detract from another's reputation or diminish him in public esteem . . . ." (27 Kansas Law Review No. 2 xvii)

It is further stated by the American Bar Association:

> "The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. *But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct.* The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. *This is its greatness and its strength, which permit of no compromises.*" (Legal Ethics, Raymond L. Wise, A. B., J.D., 1977 Supplement, Page 4.)

The above guidelines are important in arriving at a conclusion in regard to the complaints filed herein. It is further stated in Ethical Considerations, 1-2:

> "Op. 336 held a lawyer is bound by the Code in every capacity in which he acts, *whether he acts as a lawyer or not.*" (Legal Ethics, Raymond L. Wise, A.B., J.D., 1977 Supplement, Page 11.)

All motions to dismiss filed for and on behalf of the Respondent are overruled.

RECOMMENDATIONS

We recommend that Russell be given public censure by the Supreme Court as provided by Rule 203(a)(3).

Dated this 31st day of August, 1979.

/s/ Paul L. Wilbert
Paul L. Wilbert, Chairman

/s/ Lee Hornbaker
Lee Hornbaker, Member

/s/ Christel E. Marquardt
Christel E. Marquardt, Member

No. 4 of 10 **SAVE THIS**SAVE THIS**

OUR FAVORITE DISTRICT ATTORNEY AND OUR ONLY WATER & LIGHT DEPARTMENT

AFTER THE $350.00 AD ON SUNDAY, DEC. 31 IN THE KANSAN, WE WROTE THE WYANDOTTE COUNTY DISTRICT ATTORNEY AND ASKED "HOW THE UTILITY BOARD COULD SPEND PUBLIC MONEY THIS WAY?"

WE DID NOT EVEN RECEIVE THE COURTESY OF A REPLY. INSTEAD WE GOT A SLAP IN THE FACE BY THE DIST. ATTY. IN THIS PRESS STATEMENT:

"I am personally acquainted with Mr. Russell and the statements he makes. I've never known him to make a statement that was supported by EVIDENCE or FACTS." K.C. Star page 4, January 5th, Friday.

WELL LET'S PASS THESE 5 STATEMENTS AND FACTS ABOUT THE WATER AND LIGHT DEPARTMENT AND THE DISTRICT ATTORNEY ON TO THE PUBLIC.

FACT NO. 1. "On Nov. 17th, 1975 the dist. atty. filed an action in the district court to remove 2 utility commissioners. In charge 5 (of the 10 charges) on page 5 (of the 9 pages) the D.A. CHARGED 'THAT 2 utility COMMISSIONERS WILLFULLY MISCONDUCTED THEMSELVES BY PROMOTING AN EMPLOYEE TO A SUPERVISOR'S JOB BECAUSE OF POLITICAL AFFILIATION. HE WAS RELATED BY MARRIAGE TO ONE OF THE DEFENDANTS.' "

RUSSELL'S STATEMENT: THE DISTRICT ATTORNEY HAS HIS NEPHEW, THOMAS TOMASIC ON THE COUNTY PAYROLL AT $12,000.00 PER YEAR.

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RUSSELL'S STATEMENT: THE DISTRICT ATTORNEY HAS HIS NEPHEW, THOMAS TOMASIC ON THE COUNTY PAYROLL AT $12,000.00 PER YEAR.

RUSSELL'S PROOF & EVIDENCE: County records show that D.A. put his nephew on Wyandotte County payroll (1) May 4, 1976, Law Clerk, Part Time, $315.00 per month, next (2) July 22, 1977 as full time PARALEGAL, $728.84 per month. Finally, (3) January 1, 1979 as Investigator in District Attorney's office, $1,000.00 per month as INVESTIGATOR.

HOW CAN THE DIST. ATTY. OUST UTILITY COMMISSIONERS FOR PROMOTING PUBLIC EMPLOYEES WHEN HE HIRES HIS NEPHEW AND PUTS HIM ON THE PUBLIC PAYROLL. **WHAT IS NEPOTISM??? WHAT IS HYPOCRISY???**

FACT NO. 2: IN 1974 AN INTERNAL AUDIT OF THE WATER & LIGHT DEPT. SHOWED A SHORTAGE OF $261,000.00 FOR THE PAST YEAR. OF THIS SUM THE UTILITY DEPT. WAS PAID $12,500.00 ON A SURETY BOND FROM U.S.F.& G. INSURANCE CO. ON AN EMPLOYEE WHO WAS BONDED.

RUSSELL'S STATEMENT: SOME "UNKNOWN" WATER & LIGHT EMPLOYEES HELPED THEIR FRIENDS EMBEZZLE OVER $600,000.00 FROM THE CITY WATER & LIGHT DEPT. OVER A 3 YEAR PERIOD. ALL PARTIES INVOLVED WENT FREE AND UNPROSECUTED.

RUSSELL'S PROOF & EVIDENCE: (1) May 16th, 1975 audit report on file at utility shows $261,000.00 missing from 1974. "Most of difference occured in **prior years;** however, actual, precise breakdown by year is not determinable." (2) April 11, 1975 confidential letter, TOMASIC TO PAUL HAAS states: "June, 1974 Bud Roberts, along with Judge Harry Miller contacted me and disclosed that early in 1974 internal auditors reported shortage could exist in the neighborhood of $200,000.00, (3) the investigation to date has been conducted by at least 5 special agents of K.B.I. THE INVESTIGATION REVEALS THAT A PORTION MAY BE DUE TO CRIMINAL ACTIVITIES TAKING PLACE BETWEEN CUSTOMERS AND EMPLOYEES." Tomasic was an employee of U.S.F.&G; Insurance Company in the past. Whose $12,500.00 Bond did they pay on?

FACT NO. 3: In 1975 the city Water & Light attys. filed about 25 lawsuits against customers who had unpaid water & light bills from $999.00 to $10,372.34.

RUSSELL'S STATEMENT: THESE CUSTOMERS COULD NOT RUN UP WATER & LIGHT BILLS OF THIS AMOUNT WITHOUT **"INSIDE EXPERT"** HELP FROM THE OFFICE AT 7th & MINNESOTA. THEY SHOULD ALL BE PROSECUTED.

RUSSELL'S PROOF & EVIDENCE: SEE WYANDOTTE COUNTY COURT CASES No. 59926; No. 37872; No. 57073; No. 57149; No. 59933; No. 41224; No. 39931; No. 37873; No. 37873; No. 36553; No. 37873; No. 41221. **On case No. 41224 court records show J. R. Russell, Judge Protem, entered judgment after trial to court in favor of city utility dept. in amount of $2,554.47.**

FACT NO. 4: Utility Board President Paul Haas collected $600.00 per month pension, $155.00 per month insurance benefits and plus $100 per month salary as board member all at same time.

RUSSELL'S STATEMENT: NO PERSON CAN BE RETIRED FROM A PUBLIC AGENCY, COLLECT A PENSION, A SALARY AND FRINGE BENEFITS ALL AT THE SAME TIME WITHOUT A CONFLICT OF INTERESTS.

RUSSELL'S PROOF & EVIDENCE: UNDER KANSAS LAW, board members pass over pension benefits. One person cannot be retired and receive benefits from pension plan and sit on board that sets pension plan benefits that the same person is receiving. IT'S DOUBLE DIPPING ON THE PUBLIC TREASURY AT THE SAME TIME. LEGALLY NOT POSSIBLE.

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Let's See did I get those statements, evidence & facts right?

***

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION No. 79-2258

J. R. RUSSELL,
Plaintiff,

v.

THE SUPREME COURT OF THE STATE OF KANSAS,
and KANSAS BOARD FOR DISCIPLINE
OF ATTORNEYS,
Defendants.

MEMORANDUM AND ORDER

(Filed January 8, 1980)

In this action plaintiff J. R. Russell seeks injunctive relief against the Kansas Supreme Court and the Kansas Board for Discipline of Attorneys. Russell has been the subject of a disciplinary investigation by the Kansas Board. The Board has recommended that Russell be publicly censured. The recommendation in and of itself has no weight as a sanction; only the Kansas Supreme Court can impose sanctions such as the one recommended. Before the Kansas court's determination is made, Russell may file formal exceptions to the Hearing Panel Report. The Board counsel prosecuting the action and Russell will each be permitted to file briefs. A full transcript of the Board proceedings will be submitted, and the Supreme Court will then hear oral argument.

With the disciplinary proceedings in this posture, plaintiff asks that we enjoin the Kansas Supreme Court from imposing any sanctions until we have determined the merits of the plaintiff's First Amendment claim. That

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claim concerns the plaintiff's right to make certain statements in a political advertisement that lies at the heart of this dispute. The plaintiff has moved for a preliminary injunction. The defendants have moved to dismiss on the abstention doctrine and for lack of subject matter jurisdiction. All parties to the action agreed to advance and consolidate the hearing on the merits with the preliminary injunction hearing pursuant to Rule 65(a)(2). The hearing was held on November 20, 1979. The parties stipulated to and presented for our consideration the entire record of the proceedings before the disciplinary board. Counsel also argued the merits of the action and the motion to dismiss. The plaintiff has submitted his post-trial brief and the defendants have notified the court that they will rely on the briefs previously filed.

We must first address the defendants' motion to dismiss. Two grounds are raised, lack of subject matter jurisdiction and *Harris v. Younger* abstention. As to jurisdiction the defendants rely upon the recent opinion in *Phelps v. The Kansas Supreme Court,* No. 79-1381 (D.Kan. October 31, 1979). Therein Judge Brimmer stated:

> "The United States Supreme Court and the lower federal courts have held numerous times that the lower federal courts do not have subject matter jurisdiction to review state disbarment proceedings had before state courts. *Selling v. Radford,* 243 U.S. 46 (1917), *Theard v. U. S.,* 354 U.S. 278 (1958), *Gately v. Sutton,* 310 F.2d 107 (10th Cir. 1962), and *Doe v. Pringle,* 550 F.2d 596 (10th Cir. 1976). This is true even though the state court proceedings are alleged to have been constitutionally deficient. The Tenth Circuit in *Doe v. Pringle, supra,* at 599, held that, 'We concur in the district court's finding that it is without subject matter jurisdiction to review a final order of the Colorado Supreme Court denying a particular applica-

> tion for admission to the Colorado Bar. This rule applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights. . . . Doe cannot invoke the provisions of §1983 of the Civil Rights Act in federal district court so as to circumvent and avoid his obligation to seek direct review in the United States Supreme Court.' The civil rights statutes may not be read as asserting a new form of federal review between the appellate courts of the states and the United States Supreme Court. *Mildner v. Gulotta,* 405 F.Supp. 182 (D.C.N.Y. 1975)."

At this time there is no final judgment of the Kansas Supreme Court to review. However, the present action would require this court to evaluate prospectively the propriety of imposing sanctions in these particular circumstances. In light of *Phelps, supra,* and the cases cited therein, this court has no jurisdiction to consider the application of disciplinary rules in a particular case. Furthermore, no allegations have been made of due process or equal protection deprivations in the adoption or administration of the general disciplinary rules. *Phelps, supra*; and *Doe v. Pringle, supra.* Such an attack on the rules themselves would support subject matter jurisdiction. *Id.*

Even if we construed the complaint as a general due process or equal protection attack upon the disciplinary rules, or otherwise found that this court had subject matter jurisdiction, we would dismiss this action in accordance with the principles of comity and federalism. In so doing we would be following the line of cases that has developed from *Younger v. Harris,* 401 U.S. 37 (1971). Judge Rogers has recently issued two exhaustive opinions on abstention under *Younger* in *Dental Laboratories v. Duane Kolterman,* No. 78-4077 (D.Kan., March 29, 1978) and *Roger Otte v. Board of Dental Examiners of the State of Kansas,* No.

78-4126 (D.Kan., July 31, 1978). Plaintiffs in those cases attacked enforcement actions by the Board of Dental Examiners. The relationship of the dentists and the Board of Dental Examiners appears analogous to the relationship of attorneys and the Board for Discipline of Attorneys. In each case Judge Rogers found that abstention under *Younger* was proper with the limited exception of certain "flagrant and patent" constitutional violations related to advertising. The present action presents an even stronger case for abstention. As was mentioned in *Otte*, abstention based upon *Younger* is almost routinely invoked when a plaintiff seeks federal court interference with state bar disciplinary proceedings. *Gipson v. New Jersey Supreme Court*, 558 F.2d 701, 704 (3rd Cir. 1977); *A.C.L.U. v. Bozardt*, 539 F.2d 340, 345 (4th Cir.), *cert. denied* 429 U.S. 1022 (1976); *Anonymous v. Ass'n of the Bar of City of N.Y.*, 515 F.2d 427, 432 (2nd Cir.), *cert. denied* 423 U.S. 863 (1975); *Erdmann v. Stevens*, 458 F.2d 1205, 1209 (2nd Cir.), *cert. denied* 409 U.S. 889 (1972); *Tedesco v. O'Sullivan*, 420 F.Supp. 194, 196 (D.Conn. 1976); *Doe v. State Bar of California*, 415 F.Supp. 308, 311 (N.D.Cal. 1976); *Niles v. Lowe*, 407 F.Supp. 132, 136 (D.Hawaii 1976). These cases hold that the state interest in disciplinary proceedings is sufficiently significant to apply *Younger*. Contrary to the argument of the plaintiff in this action, *Younger* abstention is not reserved for only those cases that involve state criminal proceedings.

An additional requirement for *Younger* abstention is a determination that the state proceedings offer an adequate opportunity for resolution of plaintiff's federal claims. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). The plaintiff certainly has sufficient opportunity to raise his constitutional claims asserted in this lawsuit by the filing of exceptions to the Board's recommendation, by the filing of briefs before the Kansas Supreme Court, and at oral argument before that court. Furthermore,

there can be no question concerning the adequacy of the forum.

The requirement that the Kansas Supreme Court determine whether any sanction will be imposed distinguishes the instant case from *Polk v. State Bar of Texas,* 480 F.2d 998 (5th Cir. 1973). Plaintiff relies on the Fifth Circuit's opinion for the proposition that *Younger* abstention is improper in the present case. *Polk* involved the bifurcated disciplinary system of the integrated bar in Texas. A bar grievance committee there may proceed either in the state courts or on its own against an attorney. If it handles the matter administratively, its sanctions are limited to issuing public or private reprimands. More severe sanctions require the willing acquiescence of the defendant or a determination by the state courts. When public or private reprimands can be invoked without resort to the state court system, we believe that a federal court could find that no adequate opportunity to present federal claims exists. This apparently was the finding in *Polk. Polk* specifically states that it does not address the situation where disciplinary proceedings are pending before the state courts. In the case now before us, the Board's recommendation of public censure has no inherent weight as a sanction. It only triggers the Kansas Supreme Court proceedings with their attendant safeguards. Accordingly, *Polk* does not forbid *Younger* abstention in these circumstances.

A final element of the *Younger* analysis is a consideration of the exceptions to the doctrine. Three exceptions have been recognized; namely, (1) a showing of bad faith and harassment in the state prosecution, (2) "flagrant and patent" constitutional violations, and (3) the existence of extraordinary circumstances. *Kugler v. Helfant,* 421 U.S. 117, 124-25 (1975); *Younger v. Harris, supra* at 54; *Perez v. Ledesma,* 401 U.S. 82, 85 (1971). Only the first exception is raised by Russell. In *Dental Laboratories,*

supra, Judge Rogers stated: "A showing of bad faith and harassment sufficient to bring the first *Younger* exception into play is not easily made. The courts have been reluctant to find 'bad faith' in all but exceptional cases. *See Beecher v. Baxley*, 549 F.2d 974, 977 (5th Cir. 1977)." The plaintiff here claims that Nick Tomasic has now been a complaining party in three "prosecutions" of Russell. In 1976 Tomasic complained to the Kansas Board for the Discipline of Attorneys. The 1976 complaint was dismissed. Tomasic then filed a complaint against Russell before the Governmental Ethics Commission. This was also resolved in Russell's favor. The present complaint is the third formal complaint lodged by Tomasic against Russell arising out of political campaigns. Such evidence of three complaints by one person acting as an individual is insufficient to support a finding that the state itself is guilty of bad faith and harassment in its prosecutions. Exception to *Younger* applies.

Although the merits of plaintiff's claim have no relevance to our decision today, we are cognizant that freedom of speech is a highly valued right for everyone, including attorneys. The state's interest in requiring honorable conduct by attorneys is also substantial. The conflict created when these interests collide is deserving of cautious and studied consideration. This is especially true when these interests collide in the political arena. The Kansas Supreme Court is certainly capable of evaluating the constitutional claims raised by Russell and it is only proper under our system of federalism that the state court be permitted to do so.

IT IS THEREFORE ORDERED that the defendants' motion to dismiss be and hereby is sustained.

Dated this 8th day of January, 1980, at Kansas City, Kansas.

/s/ Earl E. O'Connor
United States District Judge

APPENDIX F

AMERICAN BAR ASSOCIATION

COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Re: Formal Opinion 336 **June 3, 1974**

A lawyer, whether acting in his professional capacity or otherwise, is bound by applicable disciplinary rules of the Code of Professional Responsibility.

Code of Professional Responsibility: Disciplinary Rule 1-102(A); Ethical Consideration 1-2.

The Committee has been asked from time to time whether the Code of Professional Responsibility is applicable to the conduct of a lawyer at a time when the lawyer is not engaged in the performance of his professional duties. The question has arisen since the "Watergate" episodes with some frequency in regard to DR 1-102(A) (3) and (4), which read as follows:

> "(A) A lawyer shall not: . . . (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The answer is that a lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional Responsibility whether or not he is acting in his professional capacity.

Many, if not most, disciplinary rules by their nature relate only to conduct of a lawyer acting in his professional capacity. For example, DR 7-106, which regulates the trial conduct of a lawyer, obviously is concerned with the conduct of a lawyer in his professional capacity of a trial lawyer. However, other disciplinary rules are

equally clearly designed to be applicable to a lawyer without regard to whether he is acting individually or as a lawyer. Examples include DR 8-102 (A) and (B), proscribing false statements about judges and judicial candidates.

The provisions of DR 1-102(A)(3) and (4) are not limited to a lawyer's conduct while he is acting in his professional capacity as a lawyer. They are applicable to all conduct of the nature specified in those provisions without regard to the capacity in which the lawyer may be acting.[1]

In regulating a lawyer's nonprofessional as well as professional conduct, the Code of Professional Responsibility charted no new course. It is recognized generally that lawyers are subject to discipline for improper conduct in connection with business activities,[2] individual or personal activities,[3] and activities as a judicial, governmental or public official.[4] Furthermore, many states, by statute and independent of the code, discipline lawyers for certain illegal conduct.[5] And the grossly improper conduct proscribed by DR 1-102(A) (3) and (4) is the kind of conduct that is sufficient to evidence lack of the requisite good moral character required of all members of the bar.

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1. Accord, *In re* Kirtz, 494 S.W.2d 324 (Mo. 1973).

2. See *In re* Wilson, 391 S.W.2d 914 (Mo. 1965); *In re* Gould, 164 N.Y.S.2d 48 (1957); *In re* Kirtz, 494 S.W.2d 324 (Mo. 1973); Murphy v. Erie County Bar Association, 328 N.Y.S.2d 949 (1972).

3. See Fellner v. Bar Association of Baltimore, 131 A.2d 729 (Md. 1957); Committee on Legal Ethics v. Scherr, 143 S.E.2d 141 (W.Va. 1965); Kentucky State Bar Association v. Martin, 490 S.W.2d 759 (Ky. 1973), and Anno., 36 A.L.R.3d 735 (1968).

4. See *In re* Wilson, 216 N.E.2d 555 (Ind. 1966); *In re* Chernoff, 26 A.2d 335 (Pa. 1942); Anno. 53 A.L.R.2d 305 (1957).

5. See *In re* Adams, 331 N.Y.S.2d 244 (1972); note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L.Q. 489 (1958).

As stated in EC 1-2, the "public should be protected from those who are not qualified to be lawyers by reason of a deficiency in . . . moral standards." It would be utterly incongruous with the entire tenor of the code to find that its provisions regarding lawyers who engage in fraud, deceit, misrepresentation, or illegal conduct involving moral turpitude do not apply to them when they are acting as individuals or as public servants.